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Nos. 80-1798, 80-1808 and 81-91

# In the Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
*Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
*Respondent.*

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
*Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
*Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.'s REPLY BRIEF

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## SUMMARY OF ARGUMENT

A cascade of arguments and words leap forth from respondents' briefs. There is temptation to respond with a similar effusion. The temptation must and will be withstood. Now is the time to distill and synthesize; to look to governing principles; and not to wander in the morass of minutia.

Preliminary respondents' briefs are remarkably silent with respect to the normative judgment which must be made in this case. Not a single word is spent defending the effect of the Ninth Circuit's decision upon the rights of the public, nonunion employees, or the nonunion employer. The injury to three segments of society, no matter how grievous, is quickly swept from sight.

This Court must consider the issues in the framework of their impact upon each

segment of society. Destruction of Section 7 rights of employees cannot be ignored; emasculation of Section 9 electoral rights must be considered; the economic dilemma of nonunion contractor is patent; and the effect that swollen bids, bereft of natural competition, upon the consumer should be considered paramount.[1]

Distilled to its essence, respondents' arguments are as follows:

1. The plain language of the statute interdicts petitioner's interpretation;

2. The legislative history mandates the conclusion sought by respondents; and

3. That Connell divined a host of purposes for enactment of 8(e), each of which require affirmance of the judgment below.

None survive scrutiny.

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[1]See Brief for the Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., pp. 12-22.

## ARGUMENT

### A.

### Language of the Statute

Respondents urge that the plain language of the statute requires the conclusion that subcontracting restraints are permitted under the proviso to 8(e). The argument, while straight forward, misses the mark.

In Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) this Court held that some agreements in the construction industry which limited subcontracting to signatory subcontractors violate 8(e). Thus, unless the Connell decision were reversed, the issue is which agreements violate 8(e), not whether some do. The problem, then, is one of line drawing. In such circumstances a weighing process, comparing the intrinsic merits and impli-

cations of each party's position must be invoked.

B.

The Legislative History

The parties have written more words about what the legislative history proves than the total quantum of legislative history entails. The National Labor Relations Board, quite naturally, does not pause in its recitation of its interpretation of the legislative history to admit that it made these self same arguments as amicus curiae in the Connell case. These arguments were then dispatched, as they should now be, by the Court as "bare references" and in consequence constitute an insubstantial base upon which to predicate decision.

As all concede, the proviso to 8(e) was an after thought. It did not emerge, after debate, from the traditional committee give and take. To the contrary, it

emerged, full grown, from the Conference Committee with only a sprinkling of purpose attributed to it.

Senator Kennedy's remarks can justifiably be interpreted to intend that only work standards or work preservation subcontracting restraints remain unscathed by enactment of 8(e). Whether his understanding coincided with the collective body politic is unknown. In consequence, the only reliable bellweather to consider, in light of logic and context, is the probable objectives which may be attributed to Congress.

C.

The Congressional Purpose

All concede that an overriding concern of Congress in 1959 was to put a leash on runaway, top-down organizing. Picket and other activities in pursuit of such objective destroyed the centerpiece of the National Labor Relations Act,

Section 7 rights. The National Labor Relations Board now proclaims, however, it was the intent of 8(e) to exclude non-union employees from the benefits of Section 7. Absent a clear and unmistakable statement of such purpose, it ought not to be attributed to Congress.

Second, with respect to 8(e), all concede that it was the generalized intention of Congress to prevent voluntary agreements between employers and unions which would have the same impact as overtly coercive techniques, such as picketing. In some respect, as yet undefined, Congress intended different treatment to be accorded to construction workers. Logic compels the conclusion that the difference in protection afforded can be no less generous than the differences between the construction industry and other industries require.

All parties have identified and agreed upon one difference. Construction projects do require the thrusting together of employees of different employers at transitory locations and times. Indeed Congress may have hypothesized that friction would result from shoulder-to-shoulder contact between union and nonunion employees of the same craft. To satisfy this difference, the proviso need merely be read to apply when union and nonunion employees are working on the same jobsite at precisely the same times. When they work on different days or different shifts, jobsite friction is not possible. Any subcontracting restraint, such as the one present in this case, which extends beyond this narrow purpose, is overly broad.

Respondents urge a second congressional purpose. They urge that the provision was written in order to pre-

serve jobs and collectively pooled fringe benefit programs. They have mixed their metaphors.

In National Woodwork Manufacturers Association v. NLRB, 87 S. Ct. 1250, 386 U.S. 612 (1967), this Court held that 8(e) would not be violated unless a secondary purpose were shown to exist. The Board in this case held and the Ninth Circuit confirmed that the breadth of the subcontracting clause here clearly reflected a secondary purpose. It was not confined to work preservation but rather encompassed the union and its members generally. Having conceded the presence of a secondary purpose due to the breadth of the provision here, it seeks to justify the union's actions because they are motivated by a primary purpose, i.e., work preservation.

Work preservation or standards provisions, obviously primary in purpose, are

easily written. They were not uncommon in 1959. Had the union sought to negotiate such a provision with AGC, no complaint would be before this Court.

It has been commonplace for this Court to analyze market restraints in terms of whether a legitimate objective could be achieved through less restrictive means. This is the litmus test for rule of reason antitrust scrutiny. Siegel v. Chicken Delight, Inc., 448 F. 2d. 43, 51 (9th Cir. 1971), cert. den. 405 U.S. 955 (1972); Copper Liquor, Inc. v. Adolph Coors Co., 506 F. 2d. 934, 942-43 (1975). It has also been invoked as part of a balancing test in weighing First and Fourteenth Amendment rights against Section 7 requirements of the National Labor Relations Act. Hudgens v. NLRB, 424 U.S. 507 (1976). The same balancing process should be applied here.

It must be apparent that if Congress intended the 8(e) proviso to satisfy dual objectives, i.e., avoidance of jobsite friction and maintenance of standards, such a purpose could be satisfied by a less restrictive area standards subcontracting clause, coupled with a prohibition upon subcontracting to nonsignatory contractors at jobsites when employees of signatory contractors performing jurisdictionally similar work are contemporaneously present. To permit any broader restraint than necessary to satisfy these limited objectives, tramples upon Section 7 rights of employees.

## CONCLUSION

Petitioner respectfully requests the Court to reverse the Court of Appeals decision and to remand to the National Labor Relations Board with instruction to

enter an Order declaring the signatory subcontracting provisions herein to violate Section 8(e) of the National Labor Relations Act.

Respectfully submitted,

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